SOME PHASES OF THE LAW OF MARRIAGE

IN the vast field of Comparative Law there is no subject which so profoundly affects the welfare of society as that of marriage, nor has any other institution been so powerfully influenced by superstition, religion, philosophy, and politics.

Eastern legislators regarded matrimony as a means of securing salvation in the world to come; Cæsar and Augustus encouraged it to increase the power of the Roman Empire; crafty statesmen have ever sought by means of royal alliances to extend their borders or conserve their territory, while it is one of the glories of modern jurisprudence that in the regulation of marriage its chief aim has been to improve the physical and mental development of mankind. All these varied purposes are reflected in the laws, and it is interesting, and not without present utility, to trace their origin, growth, and effect, noting points of similarity and of difference, of progress and of decadence.

I

Age, intelligence, and consent, to the Western mind the three great essentials of marriage, are considered of small importance by vast millions in the East. To the Hindoo the taking of a wife at a very early age is an imperative duty, for all hope of happiness after death depends upon the birth of a son.[1] "By a son," says Menu, "a man discharges his debt to his own progenitors," and "obtains victory over all people; by a son's son he enjoys immortality; and afterwards, by the son of that grandson he reaches the solar abode." [2] In the anxiety to secure these great rewards betrothal had its origin,[3] By this means the parents anticipate the future of their children even in infancy. It is the binding tie,[4] and the second ceremony of "con-

[1] Pour les Hindous c'était et c'est encore la plus importante affaire de la vie, la seule espérance de salut après la mort. 1 GIBELIN, DROIT CIVIL DES HINDOUS, 22.

[2] 2 COLEBROOKE, DIGEST OF HINDOO LAW, Book V, chap. 1, arts. X–XI.

[3] Jamais, chez aucun peuple, le mariage ne fut établi sur des bases faites pour inspirer plus de sollicitude et d'intérêt. Évidemment c'est là que doit se trouver l'origine des fiançailles. 1 GIBELIN, 22.

[4] C'est le premier acte qui lie définitivement les contractants. 1 GIBELIN, 21. In China also, if the betrothal is regular, it is held to be a marriage, even though it be not consummated. ALABASTER, NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW, 174.

ducting to the house," which takes place at puberty, merely marks the advent of the period for the husband to claim his bride.

This blight of child marriages affects the Chinese also, and arises from similar causes.[5] They believe that the spirits of the departed wander restlessly about unless a son performs the burial rites and offers up the fixed periodical sacrifices at the tomb. This dire fate they seek to avoid by early unions.[6]

Fear of torment after death urged the Persians to the same course. Their prophet-legislator, Zoroaster, proclaimed that it was a calamity to die unmarried because children were so many degrees in the progress to eternal joy, and the good works of those left behind assisted the parents in crossing the bridge Tchineval, over which all souls must pass to reach their heavenly home. This doctrine seems all-compelling, but he supplemented it by the offer of earthly rewards to those who reared numerous families,[7] thus establishing a precedent which has been followed by other nations in later days.

The marriage of daughters was regarded by all ancestor worshippers as a matter of less vital importance than that of sons. The latter were charged to visit the tombs of their ancestors and care for them as temples of gods, while the daughters were only expected to weep for them as mortals.[8] Some influence was necessary to compel the disposal of girls at an early age, and all the Hindoo lawgivers denounced the father who did not cause his daughter to wed when she could become a mother. Menu declared such a man "reprehensible";[9] Yama that he was "as guilty as the person who procured abortion"; and Vrihaspati that he was "a criminal who ought to be punished."[10] Zoroaster went further, and asserted that if a girl who had attained the age of eighteen died a virgin, the torments of the infernal regions awaited her until the general resurrection.[11]

These early and almost universal marriages have been the chief

[5] L'idée qu'on se fait de la vie future de l'influence heureuse qu'elle peut recevoir du culte des descendants pour les ancêtres, est une des raisons qui font désirer aux Chinois une nombreuse postérité. TISSOT, LE MARIAGE, LA SÉPARATION ET LE DIVORCE, 39.

[6] DOUGLAS, CHINA, chap. 3.

[7] PASTORET, ZOROASTRE, CONFUCIUS ET MAHOMET COMPARÉS, 424.

[8] PLUTARQUE, QUESTIONS ROMAINES, § 14.

[9] 2 COLEBROOKE, DIGEST OF HINDOO LAW, Book IV, chap. 1, art. XIV.

[10] 1 GIBELIN, 29, 30.

[11] PASTORET, 419.

cause of the stagnation of the East.[12] When the resources of Persia failed to keep pace with the excessive birth rate there came famine [13] and practical extinction, and the populations of both India and China have increased so rapidly that every energy must be devoted to the struggle for a bare existence. Gradually there has been a loss of intellectual power and virility, for, as Bagehot points out, "there is only a certain *quantum* of power in each individual, and when it goes in one way it is spent and cannot go in another."[14] With exceptional fertility came sluggishness of mind,[15] and not until gross superstition is rooted out and marriage becomes wisely regulated can the Hindoos and Chinese hope to renew their ancient greatness.[16]

The Japanese were also under the influence of Eastern cults, but their strong desire for earthly power tempered their religious zeal and saved them from disaster. Devotion to ancestral worship never interfered with their passionate love of country. They encouraged early marriages more as a duty to the State than for religious reasons, adopting the ethical precept of Confucius that "a father lives without honor if his children neglect the obligation of marriage which nature and society alike impose upon them, and the son fails in his duties if he does not leave children to perpetuate his race." [17] This was still the guiding principle in the seventeenth century when Iyeyas instructed the governing class to impress upon the people that at the age of sixteen all men and women ought to be married, "as matrimony is a great law of nature." [18] To an ambitious people, gifted with keen perception, it became evident that national strength and future expansion depended upon the procreation of a physically virile race. They realized that this was retarded by marriage in early youth, and the popular desire for the prevention of the union of children at length found expression in their code which raised the marriageable age to seventeen for males and fifteen for

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[12] There are whole countries, too, such as India, in which a right solution of the marriage question seems to lie at the foundation of the happiness of the community.

[13] 11 INTERNATIONAL CYCLOPEDIA 532.

[14] BAGEHOT, PHYSICS AND POLITICS, chap. 5, part II.

[15] SPENCER, SYNTHETIC PHILOSOPHY, PRINCIPLES OF BIOLOGY, § 366.

[16] Gibelin (vol. 1, p. 41) adduces strong reasons for his assertion that many laws which have been credited to the Romans had their origin in India, which has also given to architecture one of the seven wonders of the world.

[17] PASTORET, 419.

[18] The laws of Iyeyas, as translated in DICKSON, JAPAN, 254.

females.[19] While wedlock is permitted at these ages it is not encouraged, and the period at which it is considered advisable to marry is three or four years higher both in men and women than the limit set by the legislators.

Of all the ancient civilizations, however, the Jews have always stood as a class apart in their efforts to promote the physical and mental development of their race. This has saved them from extinction and enabled them to resist through all the centuries the battering of powerful, persistent, and relentless enemies. Although the Old Testament nowhere states the age at which Hebrews may marry, it contains every indication that it never took place in early life. Isaac and his son Esau were both forty before they took unto themselves wives, and Jacob served long and faithfully for Leah and Rebecca. These cases were no doubt extreme, and the Talmud approves the opinion of Judah, son of Tamai, that "at five years of age a child should study the Bible, at ten he should study the Mishna, at fifteen he should study the Gemara, and at eighteen he should get married." [20]

Mahomet, who hated the Jews, cursing and cajoling them in turn, adopted many of the laws of Moses, particularly as to marriage and divorce;[21] but the Koran, like the Old Testament, is silent as to the age at which marriage may be contracted. This has left each of the many Mohammedan sects free to set its own limit. The generally accepted age is fifteen, which Sale declares is supported by a tradition of the Prophet. Abu Hanifal, the founder of the Hanifites or followers of reason as opposed to tradition, thought eighteen the proper age.[22] In Turkey girls may marry at fourteen and boys upon the attainment of puberty, while among the Algerian Arabs a father has the right to give in marriage a child under the age of puberty and to compel union with whomsoever he chooses, provided the intended consort is not an "idiot, slave, infidel, leper, giant, negro, or eunuch." [23]

The highest standard of maturity to be found in early law was

[19] CIVIL CODE OF JAPAN, art. 765.

[20] THE TALMUD, "THE FATHERS," chap. 5, par. 21.

[21] SALE, TRANSLATION OF THE KORAN, Preliminary Discourse, § VI.

[22] SALE, TRANSLATION OF THE KORAN, note on chap. 4.

[23] Discountenanced by their French rulers, and now seldom exercised. Special Report of U. S. Dept. of Commerce and Labor, 1909, on statutory regulations governing marriage and divorce in certain foreign countries, part I, p. 359.

that fixed by the Incas, a race which worked out all its social problems without external influence. With them females were not held to have attained a marriageable age until they were eighteen, and males not until they were four and twenty.[24]

The Greeks in the regulation of families, as in other matters, aimed at perfection, and their great desire was to establish a race such as their sculptors patterned in marble. Plutarch says that in the days of Lycurgus the brides were never of small and tender years, and when some foreign lady remarked to the wife of Leonidas that the women of Lacedæmon were the only ones in the world who could rule men, she was met with the ready answer, "with good reason, for we are the only women who bring forth men." [25] Their philosophers, longing for the ideal, preached a higher standard than it was possible for frail human nature to attain. Plato was of opinion that women should not marry until they were twenty, and men only when they were twenty-five, and he urged that anyone entering wedlock below these ages should be considered to have done an unholy and unrighteous thing.[26] Aristotle differed from him widely. He would allow women to marry at the age of eighteen, but their husbands should be men of at least seven and thirty, for the reason that "where men and women are accustomed to marry young, the people are small and weak; more of the young matrons die, and the bodily frames of their consorts are stunted in their growth." [27] While these philosophic ideas were Utopian, they must have exercised a potent influence and helped in the formation of that noble race which, small in numbers but rich in quality, achieved results glorious and imperishable.

With the advent of Roman dominion an era of legislation was inaugurated which proved her richest legacy to posterity. Her great jurisconsults were guided by the law of nature, which is defined in the Institutes as "that law which nature teaches to all animals. Hence comes that yoking together of male and female which we term matrimony." [28] It followed from this in the logical Roman mind that union must be permitted as soon as nature allowed. The leaders of the School of the Proculians were in favor of a particular

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[24] PRESCOTT, CONQUEST OF PERU, Book I, chap. 3.

[25] PLUTARCH, LIFE OF LYCURGUS.

[26] PLATO, REPUBLIC, Book V.

[27] ARISTOTLE, POLITICS, Book VII, chap. 16.

[28] DIGEST, I. 1. 1. 3.

age being determined upon as that of puberty; the Sabinians wished to let it be regulated by nature. Justinian decided in favor of the Proculians and fixed the ages at which physical maturity should be assumed at fourteen for males and twelve for females.[29] Had this low standard been coupled with the superstitious incentive which hurried the peoples of the East into matrimony the result would have been a like increase of population. Superstitious the Romans were, in high degree, but their thoughts were centered far more on the joys of this world than of the next. They loved luxurious living, and the responsibility entailed in the care of large families would have interfered with personal pleasure. Another reason also served to retard too rapid a growth of population. They were constantly engaged in strife. Civil discords and foreign wars weakened them, and in destroying others they were themselves destroyed. Montesquieu points out that, incessantly in action, engaged in conquest and in the most violent attempts, they wore out like a weapon kept constantly in use.[30] It actually became necessary, for reasons of state, to incite the people to marriage, and it is significant that the emperors appealed, not to their hopes of heaven, but to their desire for official honors and earthly gain. Cæsar offered rewards to those who had many children and Augustus imposed penalties upon the unmarried. Assembling the knights to explain the purposes of his laws, *Julia et Papia Poppaea*, he thus addressed them: —

"While sickness and war snatch so many citizens, what must become of the state if marriages are no longer contracted? The city does not consist of houses, of porticos, of public places, but of inhabitants. You do not see men like those mentioned in fable springing out of the earth to take care of your affairs. . . . My only view is the perpetuity of the republic. I have increased the penalties of those who have disobeyed; and with respect to rewards, they are such as I do not know whether virtue has ever received greater. For less will a thousand men expose life itself; and yet will not these engage you to take a wife and provide for children." [31]

Under succeeding emperors these penalties were gradually relaxed and the rewards decreased. The influence of Stoic philosophy, voluptuousness, almost unlimited right of divorce, and, in strange

[29] INSTITUTES, Lib. I, tit. XXII.

[30] SPIRIT OF THE LAWS, Book XXIII, chap. 20

[31] *Ibid.*, chap. 21, citing DIO., Lib. LVI.

contrast, the advocacy of continence by those who embraced Christianity, all retarded natural increase. Thus from very dearth of men to resist the barbarian hordes, Rome fell.

Her place was soon occupied by the Catholic Church, whose sway became wider and more powerful than that of the great Empire had ever been, and the regulation of matrimony was one of its particular cares. Following the Roman law as to the age of maturity, the Council of Trent decreed that males could marry at fourteen and females at the age of twelve. Through the canon law this became the law of England and of all countries over which the Church exercised ecclesiastical jurisdiction. The religious ceremonies with which the nuptial tie was surrounded insured the supervision and influence of the priests and presented an almost insuperable obstacle to the union of children who were unfit. Early marriages of the physically mature, however, were looked upon with favor. They increased the number of the faithful and overcame all temptation to a riotous youth. Louis XIV, impelled by religious fervor, strove to encourage large families by his Edict of 1666, which granted pensions to those who had ten children, and much larger to those who had twelve, and the Canadian province of Quebec in recent years, for the same reason, has rewarded the parents of large families.[32]

In England the idealists perceived the danger to physical development arising out of early unions, and Sir Thomas More in his "Utopia" permits matrimony to women at eighteen and to men not before two and twenty.[33] Gradually a natural repugnance to the alliance of children has found expression in legislation, and even in many Catholic countries the standard of the canon law has been raised.[34] It is still conserved in Great Britain and all her colonies

[32] Every father or mother of a family, born or naturalized and domiciled in this province, who has twelve children living, born in lawful wedlock, is entitled to one hundred acres of public lands, to be selected by him, subject to the conditions of concession and settlement required by the law respecting Crown Lands. STAT. OF QUEBEC, 1890, chap. 26.

[33] MORE, UTOPIA. Book II, [chap. 7].

[34] The statistics which follow, and the notes thereon, except where otherwise indicated, are from special reports on marriage and divorce obtained by the U. S. Dept. of Commerce and Labor, Bureau of the Census, issued in 1909; supplemented in the case of Argentine, Brazil, Chile, Mexico, Spain, Luxemburg, Portugal, Greece, and Holland by a British Parliamentary Return of 1894, part II, containing reports on the marriage laws in these countries and especially the ages at which marriages may be contracted.

(except those oriental and the Canadian province of Ontario) [35]; by seventeen states of the Union, influenced by English law; and by the Argentine Republic, Mexico, Spain, and Portugal. Greece, following the Byzantine code, has the same limit, while Chile merely exacts that the parties be of the age of puberty. All other nations and states have set a higher standard. In New Hampshire the proposed consorts must be fourteen and thirteen; in Austria and the province of Ontario, fourteen and fourteen; in Kansas and Missouri, fifteen and twelve; Brazil, Iowa, North Carolina, Texas, Utah, and the District of Columbia, sixteen and fourteen; Alabama, Arkansas, and Georgia, seventeen and fourteen; Servia,[36] seventeen and fifteen; France, Italy, Belgium, Luxemburg, Roumania, California, North Dakota, South Dakota, Minnesota, New Mexico, Oregon, Oklahoma, and Wisconsin, eighteen and fifteen; Holland, Hungary,[37] Peru,[38] Russia,[39] Switzerland, Arizona, Delaware, Indiana, Illinois, Michigan, Montana, Nebraska, Nevada, Ohio, West Virginia, and Wyoming, eighteen and sixteen; New York and Idaho, eighteen and eighteen; Denmark and Norway,[40] twenty and sixteen; Bulgaria,[41] twenty and eighteen; Germany,[42] twenty-one and sixteen; Sweden and Finland, twenty-one and seventeen; and Washington, twenty-one and eighteen, in all cases the lower age being that for women.

It is interesting to note that while all authorities agree that maturity is hastened or retarded by climatic conditions, and is

[35] Except when marriage at a younger age is necessary to prevent the illegitimacy of offspring. STAT. OF ONTARIO, 60 VIC., chap. 14, § 68.

[36] By dispensation of a Bishop a man of fifteen or woman of thirteen may marry.

[37] Dispensation from this requirement can be obtained from the Minister of Justice. In Croatia and Slavonia the age is as in the Austrian code. Females may, however, be permitted to marry after reaching the age of twelve upon dispensation from the Bishop or Pope, but the parties to such a marriage must be separated until both have attained the age required by the state.

[38] R. DE GRASSERIE, CODE CIVILE PERUVIEN, 86.

[39] Natives of Trans-Caucasia may marry at the completion of fifteen for males and thirteen for females.

[40] These provisions are often interpreted as having reference to the age of puberty, and as this age varies with different persons, the law is not always followed literally, particularly as regards the marriageable age of women.

[41] The Mohammedans in Bulgaria, forming thirteen per cent of the population, are governed in matrimonial matters by the rules of their religion.

[42] In exceptional cases a man may be declared of age as early as the completion of his eighteenth year, and a dispensation may be granted to a woman who has not attained her sixteenth year.

earliest in the tropics, this fact has been ignored in some notable instances. In the Canadian province of Quebec, which stretches to the arctic regions and should therefore have the highest standard, girls of twelve and boys of fourteen are declared capable of matrimony, while in the more southern province of Ontario girls are not eligible until they attain the age of fourteen.[43] The same disregard of this physiological principle exists in some of the States, for in Vermont, which lies upon the northern boundary, girls may marry two years, and boys three years, earlier than those resident in Alabama, bordering on the Gulf of Mexico. In Sweden also the age limit is lower in the north than in the south, and Laplanders may marry earlier than any other persons within the realm.[44]

The changes in the age limit of France, however, have been based entirely upon climatic influence. Toullier says:

"The law of the 20th September, 1792, had increased the old standard of twelve and fourteen by one year both for boys and girls, but the reform did not stop there. The Council of State was of opinion that the rule of the Roman and canon laws, originally established for Italy, was unsuited to our northern climate, and adopted the Prussian standard. Following the Prussian code (title of marriage No. 37) men could not marry before completing their eighteenth year, nor girls before fourteen. Even this was thought insufficient, and by article 144 of the code (Napoleon) it was increased by one year for girls, those of less than fifteen [45] being declared incompetent to contract marriage." [46]

Bonaparte held the opinion, which he vigorously but unsuccessfully pressed upon the Council of State, that owing to the difference of climate and customs an exception should be made in the case of French girls born in the Indies and that these should be permitted to marry at an earlier age.[46]

In many of the countries which still cling to the canon law standard of twelve and fourteen years the safeguard of ecclesiastical ceremony is no longer obligatory, and civil marriages are permitted without any increase in the limit of age. Why should a feeling of conservatism keep upon the statute books a law sanctioning that

[43] QUEBEC CIVIL CODE, art. 115; STAT. OF ONTARIO, 60 VIC., chap. 14, § 68.

[44] U. S. Report on Marriage and Divorce, 1909, part I, p. 387.

[45] Since increased.

[46] 1 TOULLIER, LE DROIT CIVIL FRANÇAIS, 421.

which is opposed to the general conscience and to the results of scientific investigation? Dr. Reeve declares that the average age of puberty in the United States, as appears from Emmet's tables, made up of 2330 cases, is 14.23 years. These he believes to be the only American statistics, but he notes their correspondence with those of the four largest cities of France, which give 14.26 as the average.[47] This must also be approximately that of England.

The absurdity of conferring capacity by law upon a class where there is average physical incapacity is apparent, and wherever the limit of the old Roman law still prevails we may hope for a change to one more in harmony with the spirit and needs of the age.

We have dealt with those considered "o'er young to wed." Is there a period at which legislators deem men and women too old for matrimony? The Jewish patriarchs had certainly no limitation, but Montesquieu says that it was contrary to the Roman law, at one period, for a man of sixty to marry a woman of fifty. He continues:

"As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason the Calvisian *senatus consultum* declared the marriage of a woman above fifty with a man less than sixty to be unequal, so that a woman of fifty years of age could not marry without incurring the penalty of these laws. Tiberius added to the rigor of the Papian law and prohibited men of sixty from marrying women under fifty, so that a man of sixty could not marry in any case whatsoever without incurring the penalty." [48]

But Claudius abrogated this law made under Tiberius, and in the later period Roman citizens were never considered too old to marry. The only restrictions in modern law are those of Servia, where men of over sixty and women of over fifty may only be married by special license of the supreme ecclesiastical authorities;[49] and in Russia, where the marriage of persons over eighty years of age is forbidden.[50]

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[47] Dr. Reeve, in 4 PEPPER'S SYSTEM OF MEDICINE 185. This average is likely to increase with compulsory education, and Spencer points out the connection between high cerebral development and prolonged delay of sexual maturity. PRINCIPLES OF BIOLOGY, § 346.

[48] SPIRIT OF THE LAWS, Book XXIII, chap. 21.

[49] British Report on Foreign Marriages, 1894, part II, p. 128.

[50] U. S. Report on Marriage and Divorce, 1909, part I, p. 383.

II

CONSENT

As in all other contracts, consent is a requisite of legal marriage in every country. In China, however, the approval of the bride and groom is never sought. They are merely the objects of a nuptial agreement entered into by "match-makers" or "go-betweens," who represent the parents.[51] The only *consensus* required is that of these outside agents, with the restriction that no arrangement must be concluded until the families interested have assured themselves as to the physical fitness of the parties, astrologers have pronounced their horoscopes as favorable, and the relatives of the bride have signified their approval in writing. The consent of the father alone, or, if he be dead, that of the mother, is sufficient.[52] It is considered a grave breach of etiquette for young men and maidens to associate with each other, and authorities declare that in the vast majority of cases the bridegroom never sees his bride until the nuptial night. Many girls prefer going into Buddhist or Taoist nunneries, or even committing suicide, to trusting their future to men of whom they can know nothing but from the interested reports of the "go-betweens." [53] It is little wonder also that under such circumstances consent is occasionally obtained by fraud. Alabaster records the tragic case of Mrs. Wang where "an old reprobate," knowing that the girl's parents would refuse him, sent a good-looking young fellow to represent him in the preliminary stages, thereby obtaining signature to the contract, and possession of his bride. He ill-treated her and she subsequently strangled him. The tribunal considered her as unmarried and she escaped the dire penalty attached to such an offense against a consort, the case being treated as simple unjustifiable homicide of a man by whom she had been injured.[54]

Amongst the Hindoos, while the law requires the formal consent

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[51] This is also the custom in Formosa, where marriage is arranged by the parents, through "go-betweens," without regard to the feelings and preferences of the intended consorts. U. S. Report on Marriage and Divorce, 1909, part I, p. 378.

[52] ALABASTER, 172 *et seq.*

[53] DOUGLAS, CHINA, chap. 3. He cites Archdeacon Gray as authority for the statement that in 1873 eight young girls, residing near Canton, who had been affianced, drowned themselves in order to avoid marriage.

[54] ALABASTER, 175.

of the future consort,[55] in practice this is unthought of. Those who do not oppose the choice of their father are presumed to give a tacit consent. If the father is dead, or incapable, the right of disposal devolves upon the paternal grandfather, the brother, a kinsman on the father's side, or the mother, in the order named.[56] The betrothal or binding ceremony may take place in infancy, provided the parties are of an age to understand what they are doing, a period supposed to be attained at their seventh year.[57] If one of the two intended consorts refuses to marry, no compelling force may be exercised.[58] Opposition on the part of the girl is hardly conceivable, for she remains the only person in the world doomed to a state of perpetual tutelage.[59] "Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in old age; a woman is never fit for independence," says Menu.[60]

The age of seven for betrothal was also the period adopted by the Romans, not with the object of securing celestial benefit from an early marriage, but in order to assure an heir to carry on the worldly succession. The Roman betrothal differed materially from that of the Hindoos. It was only a promise to marry at some future time (*sponsalia sunt mentio et repromissio nuptiarum futurarum*).[61] Either party could renounce the engagement before the second ceremony, which could take place only after the age of puberty.[62] Under early Roman law, when the *paterfamilias* held uncontrolled power over his family, even that of life and death, the consent of children was unnecessary.[63] A father, if not himself under power, could select a wife for his son, or give his daughter in marriage, and they must submit. Late in the imperial period this privilege of dictation enjoyed by the head of the family had declined into a conditional veto. The consent of the contracting parties became

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[55] 2 DIGEST OF HINDOO LAW, Book IV, chap. 4, art. CLXIV.

[56] *Ibid.*, Book V, chap. 3, art. CXXXV.

[57] 1 GIBELIN, 20.

[58] *Ibid.*, 62.

[59] MAINE, ANCIENT LAW, 14 ed., 153.

[60] 2 DIGEST OF HINDOO LAW, Book IV, chap. 1, art. V.

[61] DIGEST, XXIII. 1. 1.

[62] Betrothals were broken by announcing the wish in these words "*conditione tua non utor*," and forfeiting the *arrhae*, *i. e.*, things given as earnest or security that the promise should be kept, if any had been given. SANDARS, INSTITUTES OF JUSTINIAN, 8 ed., 36.

[63] MAINE, ANCIENT LAW, 14 ed., 138.

essential, but the *paterfamilias* still remained a formidable obstacle. His assent was necessary no matter what the age of those under his power.[64] The son who was under the grandfather's control, must obtain his father's consent also, but this did not apply to daughters, who required only the consent of the person exercising authority over them.

This rigor of the *patria potestas* was later ameliorated in many ways. Emancipation gave freedom of choice to the son who was of age, and there were other avenues of escape. If the parties married without his consent, provided the *paterfamilias* knew of it and did not oppose, his approval was presumed;[65] or if he was absent for three years, either voluntarily or as a captive of war, this conferred upon his children the right to contract a marriage of which he could not afterwards disapprove.[66] Moreover if the father was unwilling that his daughter should take a husband, or delayed his consent, she could exercise her free will in the matter on attaining the age of twenty-five years, provided the man of her choice was free-born.[67]

By such modifications the power of the father over the persons of such of his children as were adolescent became so reduced that it was almost nominal in the latter days of the empire. It disappeared quickly and completely from the usages of advancing communities,[68] and the tendency of almost all modern legislation has been to lower the period at which full capacity is held to be attained. A wonderful advance in general education, coupled with the marvelous industrial growth which offers both greatly increased wages for home making and opportunities for independent enterprises, have quickened maturity. There has come to youth perhaps too great a confidence in its power to manage its affairs at an earlier age, particularly those matrimonial, and this resentment of restraint has impressed itself upon the laws, although some countries have shown stout resistance.[69] The age of capacity to marry without consent

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[64] Tamen filiifamilias et consensum habeant parentum, quorum in potestate sunt. COD., V. 4. 25.

[65] SANDARS, INSTITUTES OF JUSTINIAN, 8 ed., 33.

[66] DIGEST, XXIII. 2. 9. 10.

[67] 1 GIBELIN, 29.

[68] MAINE, ANCIENT LAW, 14 ed., 135.

[69] The statistics following are from the official reports of the United States and Great Britain, previously cited.

of parents is fixed in Denmark at twenty-five; in Italy at the same age for males and four years less for females; in Austria and Hungary at twenty-four; in Spain at twenty-three; in Germany, Servia, Brazil, Mexico, Portugal, England, Ireland, Wales,[70] and all the British colonies (except the Orient and two Canadian provinces) [71] at twenty-one, and in Switzerland at twenty. In the Argentine Republic the limit is twenty-two, but if a man is eighteen or a woman fifteen consent cannot be withheld from mere caprice; there must be some special reason which the law will recognize. Bad conduct or immorality, want of means to maintain a home, and inability of acquiring them are among the causes which give rise to a right of denial.[72]

As was to be anticipated, it is in the United States that we find the greatest innovation. In the case of males the common law age of twenty-one has been generally adhered to, the States of North Carolina and Georgia, where restraint ceases at eighteen, and Tennessee, where it ends at sixteen, being exceptions. It is the ages at which females may exercise their own judgment that prove startling. Some States fix it at twenty-one; others — forming a large majority — at eighteen; Maryland and Tennessee at sixteen.[73] The American girl stands in a class apart. Parental indulgence and almost unlimited social freedom, approved by friendly legislation, have caused the sex to become mistresses of their fate at the earliest ages recognized by modern law. It is a daring experiment, and the risk seems great. The two Canadian provinces of Ontario and New Brunswick, both neighboring on the United States, have been affected by this legislation and reduced the age of unrestricted choice from twenty-one to eighteen years for both sexes.[74]

Japan, on the contrary, has recoiled from the tendency of her great Pacific neighbor and adopted an extended period of control as best suited to her trend of development, believing that the fostering of veneration for parents, respect for their counsel, and sub-

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[70] In Scotland consent of parents or guardians is in no case required. U. S. Report on Marriage and Divorce, 1909, part I, p. 371.

[71] Ontario and New Brunswick.

[72] British Report on Foreign Marriages, 1894, part II, p. 2.

[73] U. S. Report on Marriage and Divorce, 1909, part I, p. 188.

[74] *Ibid.*, 350, and REV. STAT. OF ONTARIO, 1897, chap. 162, § 15, subsec. 1.

mission to their authority forms the only sound basis of loyal citizenship and devotion to the State. Their Civil Code [75] requires that

"for contracting a marriage a child must have the consent of his parents, being in the same house. This, however, does not apply if the man has completed his thirtieth year, or the woman her twenty-fifth year. If one of the parents is unknown, is dead, has quit the house, or is unable to express his intention, the consent of the other parent is sufficient. If both parents are unknown, are dead, have quit the house, or are unable to express their intention, a junior must obtain the consent of his guardian and of the family council."

France also lays great stress upon the judgment of parents. All persons who have attained majority but have not completed their thirtieth year must ask for the consent of their father and mother as an essential preliminary to matrimony. If either refuse, the interested party must serve a notice of the intended marriage upon the dissenting parent or parents, and thirty days after this notification the parties may marry despite all objection.[76] In Holland, also, all who have not attained the age of thirty must ask for the consent of parents. If this be refused or withheld, and the parties are of age, they may invoke the mediation of the judge of the canton where the parents are domiciled, who shall, within three weeks of the request, summon both parties before him and advise them in their best interests. If the father, or failing the father, the mother, does not attend, the celebration of the marriage may be proceeded with. If, after attending, the parents persist in their refusal, the marriage may be celebrated without their consent, after a delay of three months has expired.[77] In Spain daughters who have attained their majority are forbidden to leave the paternal roof until they have attained their twenty-fifth year, except with the permission of their father or mother. Sons who have attained majority must ask the consent of their parents, and in case it is not granted they must not marry for three months. They may then apply for permission from the courts of law, which are not compelled to give reasons in case of refusal. If consent is not obtained, and a marriage is contracted without permission, it is binding, subject to the regulation that it will entail absolute separation of goods, that neither party can receive anything from the other by legacy or gift, and that each

[75] Art. 772. [76] CODE NAPOLÉON, art. 151, as amended, 1896.
[77] DUTCH CIVIL CODE, arts. 98–104.

party will retain absolutely the administration of his or her own property, though with the obligation to contribute proportionately to the maintenance of the household.[78] In Russia [79] children require the consent of their parents without regard to age, and in most parts of the empire there is no appeal in case this is withheld. Marriage without such consent is not invalid, but the guilty person is liable to a penalty of from four to eight months' imprisonment, on petition of the parent, and to the loss of the right of inheritance in the property of the parent.

Reasons of state give rise to various classes of cases where special consent is required before marriage.

In Austria all illegitimate children under age must obtain the sanction of the authorities, while in all the great nations of Europe where conscription prevails the consent of superiors to the marriage of soldiers and officers is obligatory.[80] Belgian officers on active service, or officers of the reserve, in receipt of pensions, up to and of the rank of captain, must prove that they are in receipt of an income of six hundred florins exclusive of their army allowance before their request will be considered.[81] Germany imposes a criminal penalty on all members of the peace establishment (*Friedensstand*) who marry without the requisite official permission, and they are liable to confinement in a fortress for a period not exceeding three months.[82]

The consent to be obtained by members of royal families is most stringent of all. Their personal preferences and desires, during the whole period of their lives, are subordinate to the interests of the State, whose tacit or express approval is necessary before any marriage can be legally solemnized.[83] In this regard, at least, even the lowliest will not envy the mighty of the earth.

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[78] British Report on Foreign Marriages, 1894, part II, p. 137.

[79] U. S. Report on Marriage and Divorce, 1909, part I, p. 382.

[80] British Report on Foreign Marriages, 1894, part II, p. 15.

[81] *Ibid.*, 26.

[82] IMPERIAL MILITARY PENAL CODE, June 20, 1872, § 150.

[83] In Great Britain by the Royal Marriage Act (12 GEO. III, c. 11) no descendant of George II (other than the issue of princesses married, or who may marry into foreign families) may contract a valid marriage without the consent of the king or queen, given under the Great Seal, declared in council, and entered in the privy council books. But at the age of twenty-five they may marry without such consent, after twelve months' notice to the privy council, if in the meantime the two houses of Parliament have not disapproved of such marriage.

Democracy is inclining to the other extreme. It is loosening shackles and seems disposed to grant entire freedom of personal choice at too early an age. Marriage in youth produces on a woman the same injurious effects as on an inferior creature — an arrest of growth and an enfeeblement of constitution both of parent and offspring,[84] and when it becomes generally recognized that early marriages are just as harmful to the individual and to the community as child labor, we may hope for the establishment of higher standards of physical and mental maturity. It is the noble mission of medical science to strengthen and preserve the weak; that of the legislator to stay the evil at its source, and to say that, in so far as law can effect it, future generations shall be of sound mind and body, imbued with all the qualities which make for national greatness.

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[84] SPENCER, PRINCIPLES OF BIOLOGY, § 365.